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9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE NORTHERN DISTRICT OF CALIFORNIA

11 STATE OF CALIFORNIA DEPARTMENT OF
12 TOXIC SUBSTANCES CONTROL,

13 Plaintiff,

14 v.

15 BAY AREA DRUM COMPANY, INC.; DAVID H.
16 CANNON; HSCM-20; and THE GLIDDEN
COMPANY,

17 Defendant.

C02-1886 PJH

MOTION OF THE
CALIFORNIA
DEPARTMENT OF TOXIC
SUBSTANCES CONTROL
FOR JUDICIAL APPROVAL
OF SETTLEMENT
AGREEMENT AND
CONSENT DECREE
PURSUANT TO 42 U.S.C.
SECTION 9613(f);
MEMORANDUM OF POINTS
AND AUTHORITIES

Date: September 10, 2003
Time: 9:00 a.m.
Courtroom: The Hon. Phyllis J.
Hamilton

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This Motion (the "Motion") is based on, among other things, this Notice of Motion and the following Memorandum of Points and Authorities, the Consent Decree lodged herewith, and the Declarations of Barbara J. Cook and Kevin James filed herewith. The following Memorandum of Points and Authorities argues that the provisions of the Consent Decree, as they relate to defendants BAD and Cannon, are reasonable, fair and consistent with the purposes that the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. sections 9601 *et seq.*, is intended to serve, and thus should be approved and entered as a consent decree of the Court. The Motion will also be based on the Memorandum of Points and Authorities submitted by defendants HSCM and Glidden, and the declarations accompanying that Memorandum. The Memorandum of Points and Authorities submitted by defendants HSCM and Glidden argues that the provisions of the Consent Decree, as they relate to defendants HSCM and Glidden, are reasonable and fair and consistent with the purposes that CERCLA is intended to serve, and thus should be approved and entered as a consent decree of the court. The Motion is also based on any argument and evidence that may be presented at the hearing on the Motion, and such other matters as the Court may deem appropriate.

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. STATEMENT OF THE ISSUE

3 Whether the provisions of the Consent Decree resolving the alleged liability of BAD and
4 Cannon to DTSC are reasonable, fair and consistent with the purposes that CERCLA is intended
5 to serve, and thus should be approved and entered as a consent decree of the court.

6 II. SUMMARY OF ARGUMENT

7 DTSC seeks the Court's approval and entry of the Consent Decree under section 113(f) of
8 CERCLA, 42 U.S.C. section 9613(f). The Consent Decree resolves DTSC's claims against each
9 of the defendants for recovery of the costs that DTSC has incurred in response to the release and
10 threatened release of hazardous substances at the former drum reconditioning facility located at
11 1212 Thomas Avenue, San Francisco, California (the "Property"). (The total area to which
12 hazardous substances were released or threatened to be released at and from the Property is
13 referred to in this Memorandum as the "Site"). The Consent Decree also resolves any
14 responsibility the defendants might have to conduct environmental removal and remedial
15 activities in response to the release and threatened release of hazardous substances at the Site,
16 subject only to a standard "reopener" provision.

17 The Property was operated as a drum reconditioning facility for almost 40 years, from 1948
18 to 1987. BAD owned the Property from 1980 to 1984. BAD and Cannon operated a drum
19 reconditioning business on the Property from 1980 to 1987. Cannon, the President of BAD,
20 owned 50% of the stock of BAD from 1980 to 1982, and 100% of the stock of BAD from 1982
21 to 1987.

22 DTSC has entered into the Consent Decree, resolving, among other things, its claims
23 against BAD and Cannon because litigation against them would be futile. Neither BAD nor
24 Cannon has significant assets. BAD's assets were fully distributed in Chapter 7 proceedings that
25 ended in 1990.^{1/} Cannon, who is almost 70 and supports himself as an independent long-distance

26
27 1. In those proceedings, DTSC recovered approximately \$22,000 from the debtor's
28 estate. (Decl. of Kevin James ¶ 4).

1 truck driver, has few personal assets.

2 The only assets that BAD and Cannon have to offer DTSC in settlement of DTSC's claims
3 are the proceeds of BAD's liability insurance policies. BAD appears to have had comprehensive
4 general liability insurance policies (that also named Cannon as an insured), with annual limits of
5 at most \$100,000, in the years that it owned and operated the Property. As was standard in
6 comprehensive general liability insurance policies at the time, BAD and Cannon's liability
7 insurance policies either limited coverage of liability for injuries or losses to third parties from
8 releases of pollutants to injuries or losses resulting from "sudden and accidental" releases, or
9 excluded such coverage altogether.² The California Supreme Court has yet to interpret the
10 meaning of clauses in liability insurance policies limiting coverage of environmental claims to
11 injuries and losses resulting from "sudden and accidental" releases of pollutants. The California
12 Courts of Appeal have uniformly interpreted such clauses broadly, in favor of insurers. *E.g.*,
13 *Shell Oil Co. v. Winterthur Swiss Ins. Co.*, 12 Cal.App.4th 715, 753-756 (1993).

14 Pursuant to the Consent Decree, DTSC will be paid \$100,000 by BAD's insurers. In view
15 of the limited evidence of "sudden and accidental" releases (as the California Courts of Appeal
16 have understood that term) of hazardous substances during the period that BAD and Cannon
17 operated a drum reconditioning business at the Property, this sum is generous. It reflects both
18 the litigation risk confronting BAD's insurers (i.e., the possibility that DTSC will secure a
19 judgment against BAD and Cannon in these proceedings, and then bring a direct action against
20 BAD's insurers) and the cost of defending BAD and Cannon in these proceedings, and of
21 defending themselves in a direct action brought by DTSC, if DTSC were to secure a judgment
22 against either BAD or Cannon.

23 The terms of the Consent Decree result from difficult arms-length bargaining among DTSC
24

25 2. BAD's insurer from 1980 to 1983, Northwestern National Insurance Company
26 ("Northwestern"), has been unable to locate BAD's insurance policies. Northwestern's
27 comprehensive general liability insurance policies in effect during those years, however,
28 restricted coverage of liability for injuries or losses to third parties from releases of pollutants to
injuries or losses resulting from "sudden and accidental" releases.

1 and BAD's insurers. For some months, BAD's insurers refused to pay any sum to DTSC without
2 DTSC offering them what they believed to constitute evidence of "sudden and accidental"
3 releases at the Property during the period that BAD and Cannon operated there. DTSC and
4 BAD's insurers were only able to reach the agreement-in-principle memorialized in the Consent
5 Decree at a day-long settlement conference supervised by the Honorable Bernard Zimmerman of
6 this Court.^{3/} The negotiation of the Consent Decree was thus procedurally fair.

7 For these reasons, and as discussed more fully below, the Consent Decree is reasonable, fair
8 and consistent with the purposes that CERCLA is intended to serve, and should be approved and
9 entered as a consent decree of the court.

10 III. STATEMENT OF FACTS

11 A. The Contamination And Remediation Of The Site

12 The Property was operated as a drum reconditioning facility from 1948 until 1987. The
13 various drum reconditioning businesses that operated at the Property received drums containing
14 residues of aqueous waste, organic chemicals, acids, oxidizers, oils, paints and varnishes from a
15 variety of establishments. As part of the reconditioning process, the drums were flushed and
16 recoated. As a result, the residual contents of the drums, as well as reconditioning chemicals,
17 were released at and from the Property. Ultimately, the residual contents and reconditioning
18 chemicals released at and from the Property were released to the soil of the Property, to the soil
19 of parcels of land adjacent to the Property, and to ground water beneath and migrating from the
20 Property. (Decl. of Barbara J. Cook ¶ 5.)

21 In the course of the sampling conducted before the Site was remediated, more than 70.
22 different types of hazardous substances were detected in the ground water beneath and/or the soil
23 of the Site. In the course of that sampling, 17 different hazardous substances were detected in the
24

25 3. The provisions of the proposed Consent Decree, other than the consideration for the
26 Consent Decree to be provided by the defendants, are substantially similar if not identical to
27 those contained in the Settlement Agreement and Consent Decree entered by the Court in *State of*
28 *California Department of Toxic Substance Control v. Aerojet-General Corporation, et al.*, N.D.
Cal. No. C 00-4796 PJH, approved and entered by the Court on July 11, 2001.

1 soil of the Property's process building in concentrations that rendered them hazardous wastes, or
2 potential hazardous wastes, under California law. And in the course of the sampling conducted
3 during the investigation of the Site, one hazardous substance was detected in the Site's ground
4 water in a concentration that posed a risk to aquatic organisms in San Francisco Bay. (*Id.* ¶ 8.)

5 DTSC has conducted and supervised extensive removal and remedial activities in response
6 to the release of hazardous substances at the Site. Between 1983 and 1993, DTSC conducted an
7 initial investigation of contamination at the Property, an expedited response action at the Site
8 (entailing, among other things, the partial removal of hazardous substance-contaminated soil and
9 stored waste material from the Property, and the partial removal of contaminated soil from
10 residences and a vacant lot adjacent to the Property), and the further investigation of the
11 continued presence of hazardous substances in Site soil and ground water. Beginning in 1993,
12 DTSC supervised the investigation of the contamination at the Site conducted by a group of
13 entities (the "Group") that had sent (or were the successors to, or were responsible for the
14 liabilities of, entities that had sent) drums to the Property for reconditioning. Between 1993 and
15 2000, the Group, acting under DTSC's supervision, among other things, conducted flux-chamber
16 air sampling and ground water sampling at the Site, and conducted a remedial investigation and a
17 feasibility study for the Site. (*Id.* ¶ 9.)

18 In 1998, DTSC reviewed and approved (with modifications) a Final Removal Action Work
19 Plan developed by the Group for the residential backyards that adjoin the Property. In 1999 and
20 2000, DTSC reviewed and approved (with modifications) a Final Remedial Investigation Report
21 for the Site developed by the Group. In 2000, DTSC reviewed and approved (with
22 modifications) a Final Feasibility Study/Remedial Action Plan for the Site developed by the
23 Group. In 2001, acting under DTSC supervision, the Group implemented the approved Final
24 Removal Action Work Plan for the residential backyards that adjoin the Property, and the Final
25 Remedial Action Plan for the Site. The Group, among other things, remediated the soil of the
26 Site, removing approximately 7,000 cubic yards of contaminated soil from the Site. (*Id.* ¶ 10.)

27 DTSC has incurred more that \$5.31 million in costs with connection with the Site. To date,
28

1 DTSC has recovered approximately \$2.84 million of those costs. (*Id.* ¶ 11.)

2 **B. BAD And Cannon's Operations On The Property**

3 BAD was organized in 1980, and acquired the Property the same year. At all times, Cannon
4 was the president of BAD. From 1980 to 1982, Cannon owned 50% of the stock of BAD; in
5 1982, he acquired the other 50% of the stock of BAD. In 1984, BAD sold the Property to its
6 current owners. From 1980 to 1987, BAD and Cannon operated a drum reconditioning business
7 on the Property. BAD filed a Chapter 11 petition in 1986. In 1987, BAD's reorganization
8 proceedings were converted to a liquidating bankruptcy under Chapter 7 of the Bankruptcy Code.
9 BAD's estate in bankruptcy was fully administered, and its Chapter 7 proceedings closed, in
10 1990. (Decl. of Kevin James ¶ 4.)

11 BAD was insured by Northwestern National Insurance Company ("Northwestern") (a
12 member of the Northwestern/Highlands family of insurance companies) from 1980 to 1983. It
13 was insured by Transamerica (a member of the TIG family of insurance companies) from 1983 to
14 1987. Northwestern has been unable to locate BAD's insurance policies. Northwestern has
15 represented that the comprehensive general liability policies it wrote during this period limited
16 coverage of liability resulting from releases of pollutants to liability resulting from "sudden and
17 accidental" releases. This representation seems plausible: virtually every comprehensive general
18 liability insurance policy written during those years included such restrictions. TIG Insurance
19 Company ("TIG") has been able to locate the Transamerica policies. The three-year policy that
20 insured BAD from 1983 to 1986 had annual policy limits of \$100,000⁴, and contained a
21 provision limiting coverage of liability resulting from the release of pollutants to "sudden and
22 accidental" releases. The one-year Transamerica policy covering BAD and Cannon from 1986 to
23 1987 had a \$100,000 policy limit, and completely excluded coverage of liability resulting from

24
25 4. The limits of the Northwestern policies that covered BAD from 1980 to 1983 are
26 unknown. The Northwestern policies that insured the Property's operator in the late 1970s,
27 Waymire Drum Company, Inc., had \$100,000 annual policy limits and restricted coverage of
28 liability resulting from the release of pollutants to "sudden and accidental" releases. (*Id.* ¶ 5). In
any event, it is unlikely that BAD's Northwestern policies had annual limits that exceeded the
annual limits of the later Transamerica policies.

1 the release of pollutants. (*Id.* ¶ 6.)

2 DTSC inspectors observed releases of hazardous substances at the Property during the time
3 that BAD owned, and BAD and Cannon operated, a drum reconditioning business there. In or
4 about December 1983, the San Francisco Department of Public Health and DTSC inspected the
5 Property. During the December 1983 inspection, Cannon stated that BAD reconditioned drums
6 for reuse. Cannon stated, further, that the drums reconditioned by BAD were not rinsed or
7 otherwise decontaminated prior to being collected by BAD personnel. During the December
8 1983 inspection, several hundred drums awaiting reconditioning were stored in the outdoor yard
9 of the Property. Some of those drums were stacked as high as 15 feet. Many of the drums bore
10 hazardous waste labels. Behind some of the drums, and adjacent to the process building then
11 located on the Property, the San Francisco Department of Public Health and DTSC inspectors
12 observed a large sump. Run-off from the drum yard, and from inside the process building, led
13 into the sump. Samples taken of the run-off from the drum yard to the sump and from the
14 process building to the sump, and of the material in the sump, all revealed elevated levels of
15 hazardous substances. (Decl. of Barbara Cook. ¶ 7.)

16 **C. Consent Decree Settlement Negotiations**

17 In November 2002, counsel for DTSC wrote BAD's insurers, demanding payment of the
18 unreimbursed expenses that DTSC had incurred in connection with the Site. These letters
19 elicited no response from Northwestern, and a detailed request for information about the Site
20 from TIG's claims adjuster. When counsel for DTSC's repeated efforts to initiate pre-filing
21 negotiations proved fruitless, DTSC brought this action in April 2002, naming BAD and Cannon
22 among the defendants. (Decl. of Kevin James ¶ 7.)

23 Beginning in July 2002, counsel for DTSC had a number of conversations with counsel for
24 BAD and Cannon, and counsel for TIG, about settling DTSC's claims against BAD and Cannon.
25 In each of those conversations, counsel for TIG stated that TIG would be unwilling to pay any
26 sum in settlement of DTSC's claims against BAD and Cannon unless DTSC provided TIG with
27 evidence of a "sudden and accidental" release (as that term has been interpreted by the California
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1 Courts of Appeal) of hazardous substances at the Property during the time that BAD and Cannon
2 operated the Property. Although counsel for DTSC turned over to counsel for BAD and Cannon,
3 and counsel for TIG, DTSC's evidence of hazardous substance releases during the time that BAD
4 and Cannon operated the Property, TIG refused to offer to pay any sum to DTSC to settle
5 DTSC's claims against BAD and Cannon, on the grounds that this evidence did not demonstrate
6 any "sudden and accidental" releases under California law. (*Id.* ¶ 9.)

7 Counsel for DTSC has had no direct negotiations with a Northwestern representative, or a
8 Highlands Insurance Company representative, in an effort to resolve DTSC's claims against BAD
9 and Cannon. (*Id.* ¶ 10.)

10 A settlement conference was held in this matter before Magistrate Judge Zimmerman, on
11 January 16, 2003. Pursuant to Judge Zimmerman's Notice of Settlement Conference and Order
12 Scheduling Settlement Conference of August 29, 2002, and prior to the settlement conference,
13 DTSC offered to settle its claims in this matter against BAD and Cannon for \$200,000. This
14 demand represented DTSC's concern that, even if it were to secure a judgment in this matter
15 against BAD and Cannon, it would have a difficult time collecting on that judgment. BAD had
16 long since dissolved in bankruptcy, and Cannon, a man of advanced age, has few assets ^{5/} and
17 works as a long-distance trucker. And recovery on any judgment secured against BAD and
18 Cannon from BAD's insurers would be difficult at best, and is potentially precluded by the
19 limitations in BAD's insurance policies on coverage of liability for releases of pollutants to
20 "sudden and accidental" releases. (*Id.* ¶ 11.)

21 DTSC reached the agreement memorialized in the Consent Decree after a day of
22 negotiations mediated by Judge Zimmerman. Those negotiations were attended by counsel for
23 DTSC; Barbara J. Cook, P.E., Chief of DTSC's Northern California-Coastal Cleanup Operations
24 Branch; counsel for BAD and Cannon; and counsel for TIG. Counsel for TIG was in touch at
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26 5. Repeated attempts to locate assets owned by Cannon proved fruitless. Cannon was
27 served with process in this matter at a rural trailer park located some two hours north of Houston,
28 Texas. (*Id.* ¶ 8.)

1 various points during the day with TIG's claims adjustor, and with a representative of Highlands
2 Insurance Company. The settlement conference was also attended by William D. Wick, counsel
3 for HSCM and Glidden in these proceedings, and by Nicholas W. Van Aelstyn, Esq., counsel for
4 the Group.⁶ (*Id.* ¶ 12.)

5 **D. Consent Decree Provisions**

6 The Consent Decree is intended fully to resolve any liability on the part of BAD and
7 Cannon to reimburse DTSC the costs it has incurred conducting and supervising removal and
8 remedial activities in response to the release and threatened release of hazardous substances at
9 the Site, and any obligation BAD and Cannon might have to DTSC to perform removal and
10 remedial activities in response to that release and threatened release. (Consent Decree ¶ 5.1.)
11 The Consent Decree is also intended to provide BAD and Cannon protection against third party
12 claims for contribution under 42 U.S.C. section 9613(f). (*Id.* ¶¶ 7.2 & 7.3.) In return for this
13 resolution of liability, BAD and Cannon will pay DTSC the total sum of \$100,000. (*Id.* ¶ 3.1.)
14 The Consent Decree contains a "reopener" provision, allowing DTSC to pursue BAD and
15 Cannon for costs incurred responding to certain specified conditions, previously unknown to
16 DTSC, and discovered at the Site after the entry of the Consent Decree. (*Id.* ¶ 4.2.) The Consent
17 Decree also contains complex provisions specifying the parties to whom the benefit of the
18 Consent Decree inures. Generally speaking, these provisions are designed to resolve any liability
19 that BAD, Cannon, Linda Cannon (Cannon's wife), or Jack Hamilton (a longtime worker at the
20 Site who, with Cannon, owned BAD from 1980 to 1982) might have to DTSC, in connection
21 with the Site, subject to the reopener provision, and any such liability that any other former
22 officer, director, employee or agent of BAD might have in his or her capacity as such. (*Id.* ¶ 10.)

23 **E. Notice Of The Motion**

24 In order to ensure that all interested parties receive proper notice of the Motion, upon the
25 establishment of a briefing and hearing schedule by the Court, DTSC will mail a copy of the
26

27 6. Neither the Group nor any member of the Group has intervened or sought intervention
28 in these proceedings.

1 Consent Decree, the Motion and this Memorandum of Points and Authorities, the Memorandum
2 of Points and Authorities submitted by HSCM and Glidden in support of the Motion, all
3 Declarations submitted in support of the Motion, the Proposed Order granting the Motion, and
4 any Court order establishing a briefing and hearing schedule to: (1) the other potential
5 responsible parties identified by DTSC with respect to this Site^{7/}; (2) approximately 53 persons
6 or entities who or which reside or conduct business operations on, or own, real property adjacent
7 to or in the vicinity of the Property, and 83 addresses adjacent to or in the vicinity of the
8 Property; (3) the approximately 134 other persons and entities on DTSC's mailing list (other than
9 elected officials and news media) who or which have requested notice from DTSC regarding
10 activities at the Site, or who or which automatically receive such notice. (Decl. of Kevin James ¶
11 13.)^{8/} Counsel for DTSC will file an appropriate Proof of Service after conducting this mailing.
12 (*Ibid.*)

13 IV. ARGUMENT

14 In reviewing a proposed consent decree under 42 U.S.C. section 9613(f),^{9/} the Court's
15 "function is circumscribed: it must ponder the proposal only to the extent needed to 'satisfy itself
16 that the settlement is reasonable, fair and consistent with the purposes that CERCLA is intended
17 to serve'." *United States v. DiBiase*, 45 F.3d 541, 543 (1st Cir.1995) (quoting *United States v.*

19 7. DTSC will send such notice to counsel for any responsible party which DTSC knows
20 to be represented by counsel. DTSC will not send such notice to counsel for Witco Corporation;
21 Exxon Company, U.S.A.; Waymire Drum Company, Inc.; and Edward L. Waymire, each of
22 whom or which is subject to a consent decree entered by this Court more than 4 years ago,
pursuant to which DTSC resolved its Site-related claims against him or it.

23 8. Service by mail of the proposed consent decree and moving papers is reasonably
24 calculated to provide actual notice. *Tulsa Professional Collection Servs. Inc. v. Pope*, 485 U.S.
25 478, 490 (1988). DTSC will serve, by mail, all known claimants and potential claimants that are
"reasonably ascertainable," in accordance with *Mennonite Bd. of Missions v. Adams*, 462 U.S.
791, 800-801 (1983).

26 9. The Consent Decree has been entered into pursuant to 42 U.S.C. section 9313(f), and
27 not 42 U.S.C. section 9622. 42 U.S.C. section 9622 applies only to settlements entered into
28 between the United States and responsible parties. *State of Arizona v. Components, Inc.*, 66 F.3d
213, 216 (9th Cir.1995).

1 *Cannons Eng'g. Corp.*, 899 F.2d 79, 85 (1st Cir.1990)). Accord, *United States v. Montrose*
2 *Chem. Corp.*, 50 F.3d 741, 743-746 (9th Cir.1995) ("*Montrose Chem.*"). The Court's review
3 should be guided by CERCLA's express policy of encouraging settlements. *Montrose Chem.*, 50
4 F.3d at 746. Moreover, decrees negotiated by a public agency charged with furthering the public
5 interest enjoy a "presumption of validity"; "[i]t is not the Court's place to determine whether the
6 decree represents an optimal settlement in the Court's view." *United States v. Bay Area Battery*,
7 895 F.Supp.1524, 1528 (N.D. Fla. 1995) (approving proposed CERCLA consent decree)
8 (citations omitted). See also *Montrose Chem.*, 50 F.3d at 746 ("CERCLA's policy of
9 encouraging early settlements is strengthened when a government agency charged with
10 protecting the public interest 'has pulled the laboring oar in constructing the proposed
11 settlement'" (quoting *Cannons*, 899 F.2d at 84).

12 In applying the standard set forth above, courts consider four criteria: (1) procedural
13 fairness; (2) substantive fairness; (3) reasonableness; and (4) fidelity to CERCLA. See *Cannons*,
14 899 F.2d at 85-93. The Consent Decree satisfies each of these criteria.

15 **A. The Consent Decree Is Procedurally Fair**

16 DTSC negotiated the settlement terms memorialized in the Consent Decree with BAD and
17 Cannon at arm's-length. Initial settlement negotiations foundered when BAD's insurers refused
18 to pay any sum to settle this matter on behalf of BAD and Cannon unless DTSC produced what
19 the insurers considered to be adequate evidence of "sudden and accidental" releases of hazardous
20 substances during the time that BAD owned, and BAD and Cannon operated at, the Property.
21 DTSC was able to negotiate a settlement agreement with BAD and Cannon only at a settlement
22 conference conducted by Magistrate Judge Zimmerman.

23 BAD long ago dissolved in bankruptcy. Cannon supports himself as an independent
24 trucker, and DTSC has been unable to locate any significant assets owned by Cannon.
25 Accordingly, the only assets that BAD and Cannon have to contribute to the settlement of this
26 case are BAD's insurance benefits. Absent a settlement agreement with BAD and Cannon, cost
27 recovery from BAD and Cannon would entail: (1) litigating whether and to what extent BAD and
28

1 Cannon are liable to DTSC in this case; and (2) litigating whether and to what extent BAD's
2 insurance carriers for the years 1980 through 1987 are obligated to cover any BAD or Cannon
3 liability to DTSC found by the Court. Such coverage litigation would be complicated (if not
4 doomed) by the restriction on coverage of environmental liability, in BAD's insurance policy for
5 the years 1983 to 1986, to liability resulting from "sudden and accidental" releases of pollutants;
6 by the near-certain presence of identical restrictions in BAD's insurance policies for the years
7 1980 to 1983; and by the complete exclusion of coverage of liability resulting from the release of
8 pollutants in BAD's insurance policy for the years 1986 to 1987.

9 The Consent Decree was negotiated at arm's-length. Those negotiations were concluded
10 after DTSC had investigated Cannon's financial situation, and reviewed those BAD insurance
11 policies that could be located. That investigation and review persuaded DTSC that the
12 alternative to settling with BAD and Cannon was prolonged and complex CERCLA and
13 insurance coverage litigation. As such, the Consent Decree is procedurally fair.

14 **B. The Consent Decree Is Substantively Fair**

15 The Consent Decree provides that BAD and Cannon will pay DTSC an amount equal to the
16 total annual limit of one of the BAD liability insurance policies that covered BAD and Cannon
17 during the period that BAD owned, and BAD and Cannon operated at, the Property. This
18 settlement amount is substantial in view of the fact that all of the BAD liability insurance policies
19 in effect during those years either completely excluded coverage of environmental liability or are
20 known to have contained, or almost certainly contained, restrictions on coverage of
21 environmental liability to liability occasioned by "sudden and accidental" releases of pollutants.
22 Those insurance policies thus contained restrictions and coverage that potentially preclude any
23 recovery from those policies.

24 Every decision of the California Court of Appeal interpreting a "sudden and accidental"
25 restriction in a liability insurance policy has construed that restriction broadly, and ruled against
26 coverage of the claim at issue. The phrase "sudden and accidental" discharge of pollutants has
27 been held to mean only an abrupt, unintended and unexpected discharge of pollutants. *E.g., Shell*
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1 *Oil Co. v. Winterthur Swiss Ins. Co.*, 12 Cal.App.4th 715, 754-755 (1993). The close analysis of
2 "an insured's long-term, routine disposal of industrial wastes in order to find discrete sudden and
3 accidental polluting events" has been discouraged. *Travelers Cas. & Surety Co. v. Superior*
4 *Court*, 63 Cal.App.4th 1440, 1459 (1998). In *Travelers*, the Court held that, even when an
5 insured can show that an intervening event occurred after an initial disposal of hazardous waste,
6 and before the actual damage that eventually resulted, and that the intervening event was abrupt,
7 unintended and unexpected, the insured can only recover on its claim for coverage under the
8 "sudden and accidental" limitation if it can show: (1) that the intervening event did not arise from
9 the disposal of wastes in the ordinary course of business; and (2) that an "appreciable amount of
10 environmental damage was caused by the intervening event, over and above that caused by
11 routine dumping into the disposal site." *Id.* at 1460. Finally, at least one Court of Appeal has
12 limited the amount that an insured claiming coverage under a "sudden and accidental" restriction
13 in a liability insurance policy can recover to the amount of damage caused solely by the "sudden
14 and accidental" release. *Golden Eagle Refinery Co., Inc. v. Associated Int'l Ins. Co.*, 85
15 Cal.App.4th 1300, 1316 (2001). In *Golden Eagle*, the Court held that an insured cannot recover
16 under the "sudden and accidental" exception unless it can show that the sudden and accidental
17 release of pollutants at a site at which hazardous substances were disposed contributed in a
18 discrete and identifiable way to the contamination of the site.

19 Moreover, even if DTSC, in pursuing BAD's insurers pursuant to a judgment secured in this
20 action against BAD and Cannon, were able to demonstrate that a "sudden and accidental"
21 release, of the type described above, contributed in a discrete and identifiable manner to the
22 contamination of the Site, DTSC's recovery might still be limited to the total limit of BAD's
23 insurance policy in effect during one of the years in which such a "sudden and accidental" release
24 occurred. See *FMC Corp. v. Plaisted & Cos.*, 61 Cal.App.4th 1132, 1187-1191 (1998) (limiting
25 coverage for an occurrence triggered in more than one policy period to the policy limit of a single
26 period of the insured's choice notwithstanding the absence in any policy of an "anti-stacking"
27 provision).

1 DTSC would face prolonged, difficult and risky litigation were it to secure judgments
2 against BAD and Cannon in this proceeding, and then pursue BAD's insurers on its judgment
3 against them. As such, the Consent Decree's settlement amount is substantively fair.

4 The substantive fairness of the Consent Decree, moreover, is enhanced by the inclusion of
5 several non-payment provisions. First, DTSC may pursue BAD and Cannon anew, for any costs
6 it incurs as a result of newly-discovered Site conditions, or newly-developed information about
7 the Site, that lead DTSC to conclude that the response activities conducted at and for the Site
8 have been inadequate. And while the Consent Decree resolves the liability of BAD's officers,
9 directors, agents and employees to DTSC with respect to the Site (subject to the re-opener noted
10 above), with the exceptions of Cannon, Linda Cannon and Jack Hamilton, the Consent Decree
11 only resolves the liability of those officers, directors, agents and employees in their capacities as
12 such, and not with respect to any other relationship they may bear to the Site.

13 **C. The Consent Decree Is Reasonable**

14 The *Cannons* court considered three factors in determining whether the consent decree
15 before it was reasonable: (1) whether the settlement would likely be effective in ensuring a
16 cleanup of the site; (2) whether the settlement would adequately compensate the public; and (3)
17 whether the settlement reflected the relative strength of the parties' bargaining positions.
18 *Cannons*, 899 F.2d at 89-90. As the Site has already been cleaned up, our examination is limited
19 to the last two criteria.

20 The proposed Consent Decree adequately compensates the public. Pursuant to the Consent
21 Decree, DTSC will receive the annual policy limit of one of BAD's insurance policies in effect
22 during the years that BAD and Cannon operated at the Property. As set forth above, this sum
23 could well be the most that DTSC could hope to recover were it successfully to litigate this
24 action and secure a judgment against BAD and Cannon, and were it successfully to prosecute a
25 coverage claim against BAD and Cannon's insurers. DTSC, moreover, will be spared the
26 expense of litigating BAD and Cannon's liability for the costs that DTSC has incurred in
27 connection with the Site, and the significant expense and risk of litigating against BAD's
28

1 insurers. The Consent Decree, moreover, protects the public by explicitly allowing DTSC to
2 seek further costs from BAD and Cannon in the event DTSC learns of previously unknown
3 conditions at the Site, or learns new information about the Site not previously available to it, that
4 demonstrates that the environmental response activities conducted at and for the Site are
5 inadequate.

6 The Consent Decree also reflects the relative strength of the parties' bargaining positions.
7 As set forth above, BAD long ago dissolved and distributed its assets, and Cannon has limited
8 means. While BAD's pre-1986 insurers^{10/} are potentially responsible for any judgment that DTSC
9 might secure against BAD and Cannon, those insurers have substantial defenses to any assertion
10 of coverage by DTSC. The Consent Decree affords DTSC an amount equal to the annual policy
11 limit of one of the policies in effect during the period in which BAD and Cannon operated at the
12 Property - a sum that could be the most that DTSC could hope to recover in litigation. And
13 DTSC will be able to recover this sum without being put to the expense and risk of liability and
14 insurance coverage litigation.

15 The terms of the Consent Decree adequately protect the public interest and reflect the
16 relative bargaining strengths of DTSC, BAD, and Cannon. As such, the Consent Decree is
17 reasonable.

18 **D. The Consent Decree Is Consistent With The Purposes That CERCLA Is**
19 **Intended To Serve**

20 One of the chief purposes of CERCLA is to allow government agencies to recover their
21 environmental response costs rapidly, so that the sums recovered can be used either at the same
22 site or at other sites. *See, e.g.*, 42 U.S.C. section 9607(a) (authorizing recovery of interest on
23 environmental response costs from the date of demand of payment); 42 U.S.C. section 9613(f)(2)
24 (providing contribution protection to parties settling with a government agency in an
25 administrative or judicially approved settlement, thereby encouraging the settlement of CERCLA
26 claims); 42 U.S.C. section 9613(g)(2) (requiring a court holding a defendant liable under

27 10. As set forth above, BAD's insurance policy for 1986-1987 completely excludes
28 coverage of liabilities resulting from the release of pollutants.

1 CERCLA for a government agency's past environmental response costs to enter declaratory
2 judgment against the defendant, and in favor of the government agency, on liability for future
3 environmental response costs, thereby speeding the recovery of future response costs); 42 U.S.C.
4 section 9622(g) (requiring the United States Environmental Protection Agency to conclude *de*
5 *minimis* settlement agreements whenever practicable and in the public interest); and 42 U.S.C.
6 section 9622(h)(1) (allowing federal agency heads to settle CERCLA claims at smaller sites
7 without United States Department of Justice approval).

8 The provisions of the Consent Decree resolving DTSC's claims against BAD and Cannon
9 afford DTSC rapid and certain recovery of a significant sum of money from BAD and Cannon
10 that it can put to use at other sites at which it is conducting cleanup activities. Absent the
11 Consent Decree, DTSC would be put to the expense, delay and risk of litigating BAD and
12 Cannon's underlying liability, and pursuing BAD's insurers in coverage litigation. At the end of
13 that process, DTSC could well recover nothing for its efforts. The Consent Decree thus clearly
14 furthers one of the key purposes of CERCLA - to ensure the rapid and certain recovery of
15 response costs by government agencies.

1 V. CONCLUSION

2 For the foregoing reasons, DTSC respectfully requests this Court to approve the
3 provisions of the Consent Decree resolving DTSC's claims against BAD and Cannon. DTSC
4 also respectfully requests the Court to approve the provisions of the Consent Decree resolving
5 DTSC's claims against HSCM-20 and Glidden for the reasons set forth in the Memorandum of
6 Points and Authorities submitted by those defendants. Finally, DTSC respectfully requests this
7 Court to enter the Consent Decree.

8 Dated: July 10, 2003

9 Respectfully submitted,

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13 

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